IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1977

Docket No. 77-1751

JOHN D. STROUP,
Petitioner,

v.

STATE OF TENNESSEE, BROOKS McLEMORE,
Attorney General of Tennessee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Tennessee

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TABLE OF CONTENTS

Table of Authorities

Cases:

Statutes:

Judicial Code:

Rules of the Supreme Court

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To the Supreme Court of Tennessee

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John D. Stroup, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled cause on May 2, 1977.

OPINIONS BELOW

The denial of Writ of Certiorari by the Supreme Court of Tennessee is printed in Appendix A hereto, *infra*, page 1a. The

Opinion of the Court of Criminal Appeals of the State of Tennessee is unreported and is printed in Appendiix B hereto, *infra*. page 2a.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and Rule 22 of the Rules of the Supreme Court.

QUESTIONS PRESENTED

The two questions presented to this Court are the following: Whether a violation of due process of law as guaranteed by the Fourteenth Amendment occurs where a criminal trial court instructs a jury as to the possibility of parole and the further possibility that the defendant's sentence may be subsequently reduced by the serving of "good time" and "honor time;" and whether the giving of such an instruction can ever constitute harmless error when the jury convicts and sentences the defendant to a term of years. It is petitioner's position that these are questions of first impression.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved herein is the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Also involved are Sections 39-2032, 40-3612, 40-3613, 41-332, and 41-334 of the Tennessee Code Annotated.

STATEMENT OF THE CASE

The petitioner, John D. Stroup, was indicted for violating Section 39-2032, Tennessee Code Annotated, to wit: Professional gambling on May 13, 1976. (2a)[1] The indictment alleges that the petitioner did unlawfully, willfully, and feloneously engage in professional gambling, within this State in violation of said Section, by offering to accept and accepting from two individuals, for profit, money and credits to be risked in gambling on professional baseball games and professional basketball games.

The petitioner went to trial on his plea of not guilty on January 13, 1976. On January 16, 1976, the jury found the petitioner guilty of professional gambling and fixed his punishment and imprisonment in the State Penitentiary for not less than two (2) years, nor more than two (2) years. The trial court sentenced the petitioner in accordance with the verdict of the jury.

On February 4, 1976, the petitioner filed his motion for a new trial, and on March 17, 1976, filed an amended and supplemental motion. This motion was heard and overruled on February 19, 1976, to all of which the petitioner duly excepted and prayed an appeal in the nature of a Writ of Error to the Court of Criminal Appeals sitting in Jackson, Tennessee. Said appeal was granted, and the decision of the trial court was affirmed. (6a)

A Petition for Writ of Certiorari to the Tennessee Supreme Court was filed, but the Writ was denied on May 2, 1977. (1a)

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[1] The suffix "a" refers to the page numbers within the appendices to this petition, *infra*.

REASONS FOR GRANTING THE WRIT

This Petition raises two important issues. The first is whether the same Federal Constitutional standard of fairness applied in determining the guilt of the defendant should be applied in the sentencing of that same individual. By instructing the jury as to the possibility of parole[2] and the concepts of "good time"[3] and "honor time"[4] in reducing the defendant's actual period of imprisonment, the trial court asked the jury to consider factors which are not only contrary to the court's own instructions,[5] but more importantly are unconstitutional. Consideration of such factors by the jury will tend to extend the actual sentence that the jury otherwise might hand down, violative of the Fourteenth Amendment Due Process Clause guaranteeing fairness in the proceedings.

Generally, state courts have held that including information on parole, good time, and honor time in jury instructions constitutes reversible error. Indicative of such state court decisions is *Carr v. State*, 417 P. 2d 833 (Okla. Cir. 1966). Here the defendant's conviction of robbery with a firearm was reversed on appeal because the following instruction was found to be prejudicial:[6]

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[2] For the trial court's instruction as to the effects of parole, see Appendix D, *infra*, at 10a.

[3] For the instruction concerning "good time," see Appendix D, *infra*, at 11a.

[4] For the instruction about "honor time," see Appendix D, *infra*, at 11a.

[5] "The jury in no case should have any sympathy or allow anything but the law and the evidence to have any influence upon them in determining their verdict." Appendix D, *infra*, at 10a.

[6] Other exemplary cases following this general holding in relation to instructions on parole, etc., include *People v. Morse*, 388 P. 2d 33 (Cal. 1964); *McKuhen v. State*, 115 S.E. 2d 625 (N.C.1960); *Graham v. State*, 304 S.W. 2d 622 (Tenn. 1957); *People v. Kroeger*, 390 P. 2d 369 (Cal. 1964); and *Farris v. State*, 535 S.W. 2d 608 (Tenn. 1976).

> "If you assess under the indeterminate sentence law, the pardon and parole board is required to review the defendant's case at the end of the minimum term you fix." *Id.* at 835.

The Supreme Court of Tennessee has indicated that such an instruction to the jury is a violation of due process. In *Farris v. State, supra,* the Tennessee Supreme Court noted that "jurors should not be permitted to speculate on the length of sentences, discretionary parole, the accumulation of good and honor time, and a whole conglomeration of contingent events which, if they come to pass at all, will come to you in trial." *Id.* at 613. Despite this strong assertion that constitutional rights are involved, the Supreme Court of Tennessee, by denying certiorari in this case, concurred with the Tennessee Court of Criminal Appeals in holding such an instruction to be "harmless error."[7]

Federal due process is violated as a result of the prejudicial effect this instruction has on the jury in two ways. First, the possibility that a defendant may be released prior to his or her full term may cause a jury to allocate a longer sentence knowing that the actual time served in prison could be reduced. [e.g. *Carr v. State, supra,* at 386]. The petitioner's minimum sentence in the instant case was, in fact, doubled.[8]

In addition, the conviction stage itself may be substantially prejudiced when the jury is less than positive as to the guilt of the defendant. Knowing that there are areas of relief available to minimize the actual time served, the jury could pass on its responsibility to some other body, such as a pardons and parole board, to make a decision about the individual's ability to live within the community. In *United States v. Davidson*, 367 F. 2d

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[7] See *Graham v. State, supra,* and *Farris v. State, supra.*

[8] See Appendix C, *infra*, at 7a; and Appendix B, *infra*, at 2a.

60 (Tenn. 1966), the court held that the trial judge's instruction to the jury concerning leniency,[9] ". . . was prejudicial . . . *in that it was conducive to* [*a*] *compromise verdict.*"

The fear of a compromise verdict was also discussed in *People v. Morse, supra.* In the guilt phase of the trial, "the accepted rules forbid the jury from resolving doubts in favor of conviction upon the hypothesis that an appeal can cure the possible error or that the defendant may obtain a parole or a pardon." *Id.* at 45, 46. Indeed, whether the effect is to lengthen the sentence, or make conviction come more easily, the result is similar; that is, real unfairness occurs in the proceedings—unfairness which requires a judicial finding of unconstitutionality. The most important consideration is the fact that the instructions do not provide guidance to the jury based upon the law and evidence, but permit passion and prejudice to form the basis for the sentence.

The second question presented is whether there can ever be harmless error as held by the Tennessee Court of Criminal Appeals and tacitly approved by the Supreme Court of Tennessee, where the jury is instructed about parole, good time, and honor time. This Court has not established constitutional standards for the punishment stage relating to the concept of harmless error. A reasonable test should follow the standard established for the conviction stage in *Chapman v. California,*[10] 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1966).

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[9] In *U. S. v. Davidson, supra,* the jury was deadlocked for a period of time where the defendants were convicted of receiving stolen property. One of the jurors asked for an instruction as to the jury's capacity to recommend leniency to the court during the sentencing stage. Instruction was given causing the prejudicial error to occur.

[10] The defendant was convicted in a state court for charges of robbery, kidnapping, and murder. During the trial, the defendant chose not to testify, an action that the prosecution pointed to during the trial. The California Supreme Court affirmed the convictions on harmless error, but the United States Supreme Court reversed.

In that opinion this Court adopted the following as a harmless error rule for the conviction stage of the trial proceeding: ". . . whether there is a possibility that the evidence complained of might have contributed to the conviction." *Id.* at 710. This test clearly establishes the proposition that the constitutional errors that affect the substantial rights of a party are not to be treated as harmless. ". . . [B]efore a federal Constitutional error can be held harmless, the court must be able to declare a belief that it was *harmless beyond a reasonable doubt.*" *Id.* at 714. Certainly, where a trial judge explains not only the effect of parole, but also that of good time and honor time, the conclusion is inescapable that a strong possibility exists that the jury was inappropriately influenced by the instructions of the trial judge. As stated hereinabove, petitioner's minimum sentence in the instant case was doubled by the jury.

Even where the court properly instructed the jury to discount evidence incorrectly included during the trial, this Court in *Burgett v. Texas,*[11] 389 U. S. 109, 19 L. Ed. 2d 319, 88 Sup. Ct. 258 (1967), held the error to be harmful. "The admission of a prior criminal conviction which is constitutionally infirm . . . is inherently prejudicial and we are unable to say that the instruction to disregard it made the Constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. California.*" *Id.* at 325. Although these cases discuss the application of the harmless error rule to the conviction stage of the trial, its applicability is just as relevant to the sentencing stage.

To allow such guesswork in dealing with the liberty of an individual is foreign to our system of justice. "It tends to make a

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[11] Evidence of a prior illegally obtained conviction was included in the proceedings before the court instructed the jury to discount the information. The prior conviction had been obtained in violation of the defendant's right to counsel.

jury speculate on the length of time a defendant will be required to serve and further tends to breed irresponsibility on the part of jurors premised upon the proposition that corrective action can be taken by others at a later date. A greater defect in the law stems from the fact that jurors tend to attempt to compensate for future clemency by imposing harsher sentences." *Farris v. State, supra,* at 614. Such instructions cannot be swept aside as being merely harmless error.

CONCLUSION

This is a case of first impression for this Court. It raises a substantial Constitutional question under the Fourteenth Amendment to the Constitution of the United States.

This Court should establish the same standard of fairness for the sentencing stage of a criminal trial it has established for the trial stage.

Wherefore, this Petitioner prays that Certiorari issue to the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Supreme Court of Tennessee
At Jackson

John D. Stroup,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Shelby Criminal No. 5

In Re: Petition for Writ of Certiorari of John D. Stroup

Upon consideration of the petition and brief in support thereof of John D. Stroup, the reply brief of the State of Tennessee, the opinion of the Court of Criminal Appeals and the record in the cause,

Finding no error in the Court of Criminal Appeals the writ is denied at the cost of petitioner.

Per Curiam

APPENDIX B

In the Court of Criminal Appeals of Tennessee
At Jackson

October 1976

John D. Stroup,	Appellant,	No. 5
v.		Shelby Criminal
		Honorable William H. Williams, Judge
State of Tennessee,	Appellee.	(Professional gambling)

For the Appellant: Houston McKnight, Memphis, Tennessee.

For the Appellee: R. A. Ashley, Jr., Attorney General, Nashville, Tennessee; Jack E. Seaman, Assistant Attorney General, Nashville, Tennessee; Richard S. McNeese, Assistant District Attorney General, Memphis, Tennessee.

Judgment Affirmed
Mark A. Walker, Presiding Judge

Opinion Filed:
February 23, 1977

OPINION

The appellant, John D. Stroup, was convicted of professional gambling in violation of TCA 39-2032 and sentenced to not less than two years nor more than two years in the penitentiary. The indictment charged that between April 13, 1974, and May 13, 1974, the appellant engaged in professional gambling by offering to accept and accepting from Harold Halliburton

and Barry Moore, for profit, money and credits to be risked in gambling on professional baseball and basketball games.

In October, 1973, Memphis police began an investigation of bookmaking gambling in the city. They established a headquarters in a rented apartment and had several telephones installed for the purpose of placing bets. They had tape recorders attached to these phones to monitor and record the conversations.

Harold Halliburton, a barber who had lost large sums gambling, agreed to assist police in their investigation. On April 13, 1974, Halliburton received from David Looney, with whom he had gambled previously, a telephone number and the name "Allen." Looney and the appellant married sisters and Looney refers to him as "Allen."

On April 13, 14, 16 and 24, Halliburton and Barry Moore, a Memphis policeman, made phone calls to "Allen" at the number provided by Looney and, from the conversations between them and "Allen", they made numerous bets on various athletic contests, especially major league baseball.

"Allen" directed Moore to settle all bets with Robert Singer. On April 29 Moore met Singer in a Memphis restaurant where they exchanged money in settlement of the bets.

A telephone company representative testified this telephone number used by "Allen" was registered to John D. Stroup, the Appellant. Looney also testified that this same number he provided to Halliburton was that of the appellant.

The appellant did not testify. Robert Singer denied any dealings with him.

In challenging the sufficiency of the evidence, the appellant insists the state failed to show he was engaged in gambling as

a business, that it showed he engaged in it for fun; and, in any event, he was unsuccessful in the venture. For these reasons, he says he does not come within the prohibitions of TCA 39-2032.

Moore made 23 bets with "Allen" involving $3090 over a two-week period, in which Moore won about $850. From the large number of bets, the amount of money in the transactions, and the short time interval, the appellant was clearly engaged in gambling of the type designed to augment his personal income which is prohibited by the statute. *Squires v. State*, Tenn.Cr.App., 525 S.W.2d 686; *Alley v. State*, 218 Tenn. 497, 404 S.W.2d 493.

The appellant also argues that he did not personally participate in any exchange of money. Although the evidence does not show that the appellant physically handled the money, the funds exchanged by Singer were at his direction.

He further contends that the statute is aimed only at punishing successful gamblers or those who actually show a profit. His interpretation would make his responsibility depend upon the outcome of an athletic event, an obvious absurdity. The phrase "for profit" is meant to emphasize that only gambling conducted as a business is proscribed by the statute. See also TCA 39-2033(1). The bets here gave the appellant an unequal advantage in a series of transactions, regardless of the outcome of the particular games, and constituted a business.

The evidence does not preponderate against the verdict and the assignments on the weight and sufficiency of the evidence are overruled.

The appellant urges that the state violated TCA 39-4533 by recording his telephone conversations and that the tapes should have been suppressed. This statute proscribes interrupting or interfering with public services and appliances.

In addition, TCA 65-2117 prohibits the wiretapping of phones without consent of the owner or his agent of the line. Taken together, these statutes authorize, by implication, the recording of a telephone conversation where one party to the conversation consents to the recording.

This interpretation is buttressed by the Crime Control Act of 1968, 18 U.S.C. secs. 2510-20, which specifically exempts consent recordings from its prohibitions. 18 U.S.C. 2511 (2), (c)(d). See also *Rathbun v. United States*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134 (1957); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966) Consequently, Halliburton's consent made these recordings lawful.

The tape recordings were properly identified, the conversations on them were shown to be accurate reproductions of the conversations during the gambling, and the voices were identified. The voice of "Allen" was questioned as it related to the appellant. "Allen" answered the telephone and conducted the bookmaking at appellant's telephone number. Several witnesses (including Singer) said the voice on the tapes sounded like that of the appellant. Moore and Looney also thought "Allen's" voice sounded like the appellant's, though they did not make positive identification.

For authentication purposes, voice identification by a witness need not be certain; it is sufficient if the witness thinks he can identify the voice and express his opinion. *Auerbach v. United States*, 136 F.2d 882 (6th Cir. 1943). The weight of this identification is for the jury. Underhill's Criminal Evidence, Sec. 129 (6th ed. 1973). This evidence was admissible.

Without merit is the complaint that the court erred in permitting a telephone company employee without her records to testify as to appellant's number. This does not violate the best evidence rule as contended by the appellant because Looney testified to the same fact. *Davis v. State*, 92 Tenn. 634, 23 S.W. 59.

The appellant says the court erred by instructing the jury on conspiracy. The trial judge charged on the law of conspiracy as a rule of evidence and not as a separate offense. Since there was evidence of a gambling conspiracy among Singer, Looney and the appellant, the court did not err by instructing on that evidence.

The appellant complains of the instructions on parole. The jury could have fixed his punishment at five years' imprisonment and a $1000 fine. Under the facts of this case, the charge was harmless.

We have considered all assignments and find them to be without merit.

Affirmed.

Honorable Lloyd Tatum did not participate in the decision of this case.

/s/ MARK A. WALKER
MARK A. WALKER
Presiding Judge

Concur:
/s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL
Judge

APPENDIX C

Constitutional Provisions, Statutes and Rules Involved
United States Constitution

Amendment XIV.—Citizenship: Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation: Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated

39-2032. Professional gambling.—Whoever engages in professional gambling, or knowingly causes, aids, abets or conspires with another to engage in professional gambling shall be guilty of a felony and shall be fined not more than one thousand dollars ($1,000) and shall be imprisoned in the penitentiary for a period of time not less than one (1) year and not more than five (5) years [Acts 1955, ch. 234, § 2.]

40-3612. Eligibility for Parole.—Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the Court for the crime of which he was convicted, shall be subject to the jurisdiction of the board. The time of his release shall be discretionary with the board, but no such person

shall be released until he has served such minimum sentence or until he shall have served one (1) year.

The action of the board in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

If a prisoner has been accorded a bona fide offer of employment, the Board may release the prisoner on probationary parole under either of the following conditions:

1. At any time not more than six (6) months before the date of his eligibility for parole as provided in Chapter 36 of Title 20, Tennessee Code Annotated if, after all credit for good conduct, that eligibility shall occur more than eighteen (18) months and less than five (5) years from the date of sentence.

2. At any time not more than one (1) year before the date of his eligibility for parole as provided in this Chapter if, after all credit for good conduct, that eligibility shall occur more than five (5) years from the date of sentence.

The prisoner shall at all times during probationary parole be under the supervision of the Division of Probation Paroles. The Board may revoke the probationary parole for any reason satisfactory to it.

40-3613. Power to Parole.—The board of pardons and paroles shall have power to cause to be released on parole any person sentenced to confinement in the penitentiary who has served the minimum term provided by law for the offense committed by him, less good time.

41-332. Good Behavior Allowance.—Each convict who shall demean himself uprightly shall have deducted from the time for which he may have been sentenced, one (1) month for the

first year, two (2) months for the second year, and three (3) months for each subsequent year until the tenth year inclusive and four (4) months for each remaining year of time of imprisonment. This shall apply to prisoners in confinement or on parole therefrom.

41-334. Honor Grade—Time Allowance.—The said commissioner of institutions shall have the right and power to establish an honor grade in which convicts shall be placed when received at the prison. The allowance for honor grade shall be two (2) months of each year of the term of service.

APPENDIX D

Instructions to the Jury

Eligibility for Parole

Section 40-3612 of the Tennessee Code Annotated reads as follows: "Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the Court for the crime of which he was convicted, shall be subject to the jurisdiction of the board. The time of his release shall be discretionary with the board, but no such person shall be released until he has served such minimum sentence or until he shall have served one (1) year.

The action of the board in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

If a prisoner has been accorded a bona fide offer of employment, the Board may release the prisoner on probationary parole under either of the following conditions:

1. At any time not more than six (6) months before the date of his eligibility for parole as provided in Chapter 36 of Title 20, Tennessee Code Annotated if, after all credit for good conduct, that eligibility shall occur more than eighteen (18) months and less than five (5) years from the date of sentence.

2. At any time not more than one (1) year before the date of his eligibility for parole as provided in this Chapter if, after all credit for good conduct, that eligibility shall occur more than five (5) years from the date of sentence.

The prisoner shall at all times during probationary parole be under the supervision of the Division of Probation Paroles. The Board may revoke the probationary parole for any reason satisfactory to it."

Power to Parole

Section 40-3613 of the Tennessee Code Annotated reads as follows:

"The board of pardons and paroles shall have power to cause to be released on parole any person sentenced to confinement in the penitentiary who has served the minimum term provided by law for the offense committed by him, less good time."

Good Behavior Allowance

Section 41-332 of the Tennessee Code Annotated reads as follows:

"Each convict who shall demean himself uprightly shall have deducted from the time for which he may have been sentenced, one (1) month for the first year, two (2) months for the second year, and three (3) months for each subsequent year until the tenth year inclusive and four (4) months for each remaining year of the time of imprisonment or on parole therefrom."

Honor Grade—Time Allowance

Section 41-334 of the Tennessee Code Annotated reads as follows:

"The said commissioner of institutions shall have the right and power to establish an honor grade in which convicts shall be placed when received at the prison. The allowance for honor grade shall be two (2) months of each year of the term of service."

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1977

Docket No. 77-175

JOHN D. STROUP,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Table of Authorities

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SUPREME COURT OF THE UNITED STATES

..... TERM, 1977

Docket No. 77-175

JOHN D. STROUP,
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v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of Tennessee be denied.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are two in number and can be stated as follows:

1. Whether a state statute requiring a criminal jury to be instructed as to the possibility of parole, and that a defendant's

sentence may be subsequently reduced by serving "good time" and "honor time" is unconstitutional as a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether a state appellate court can apply harmless error in a case where the jury has been instructed about parole, "good time" and "honor time."

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 40.3, 28 U.S.C.A., respondent submits the following statement of the case as only that deemed necessary in correcting any inaccuracy or omission in the statement of the case set forth in the petition for a writ of certiorari.

The first witness called by the State was Lt. John Talley, a detective with the Memphis Police Department (B.E. 55). From October of 1973 until about August of 1974, Lt. Talley was engaged in a project called "Operation Booker One" wherein his duty was to oversee the work of undercover officers and cooperating individuals who were making bets with certain persons (R. 56-58). Part of this project included an investigation of John Stroup (R. 59). As part of the project, Officer Talley had rented an apartment and had installed several telephones for the sole purpose of placing bets (R. 59). Additionally, sound recording devices were installed so that the telephone conversations could be monitored and recorded (R. 60). In connection with the investigation of John Stroup, Officer Talley observed the making of approximately 15 or 20 tapes of conversations between individuals under his direction and a party answering the telephone at the number registered to John Stroup (R. 61, 62, 65, 66). One of the cooperating individuals in this case was Mr. Harold Richard Halliburton, known to Lt. Talley as

a former barber who had lost large sums of money gambling and agreed to assist the authorities in this case (R. 63, 64).

Mr. Harold Richard Halliburton testified that in October, 1973 he began working for John Talley of the Memphis Police Department and that the work consisted of betting on ball games (R. 71). During the course of his work, he placed bets with a David Looney, approximately 40 or 50 $100 bets, on basketball games (R. 73, 74). Mr. Halliburton also placed bets on basketball games with Robert Singer (R. 75). Also, as a result of a conversation with David Looney on or about April 13, 1974, he telephoned number 358-7958 and talked with a guy named Allen (R. 76). That conversation and other telephone conversations were tape recorded with his consent (R. 77, 78).

Mr. Halliburton identified four tape recordings as his conversations with the guy named Allen wherein he placed bets with a person named Allen (R. 162-198). He testified further that he had bet over the phone on ball games with Dave Looney who had given him Allen's name and telephone number to call to bet baseball (R. 186). He testified that he gambled with a guy named Allen at 358-7958 (R. 196). In response to questions of whether or not he ever exchanged money with Allen, Mr. Halliburton testified that when they first started betting with Looney they were told to settle with Singer so they always settled with Mr. Singer (R. 188).

Jerry S. Bullock, a South Central Bell employee for 20 years, testified that she was custodian of books and records relating to residential accounts (R. 198, 201). She testified that the records reflected that on April 14, 1974, the number 358-7958 was registered to John D. Stroup and no address was contained on the record (R. 201-202).

The next witness was Barry Hale Moore of the Memphis Police Department (R. 205). He testified that beginning in the

last part of 1973 as a member of the vice squad he worked on Operation Booker One (R. 207). As a part of this operation, he worked with a Mr. Halliburton in the investigation of a person known as Allen (R. 208). He testified before the jury that he bet on baseball and basketball games (R. 284). Further, all money transferred were handled with Robert "Bobby" Singer at the direction of Allen during their telephone conversations (R. 293-295). Introduced into evidence were five photographs taken by this witness of a house at 815 Northaven Drive showing a mailbox with the name "Stroup" on it and a Lincoln Continental automobile parked in front (R. 296-301). Moore testified that he made 23 bets with Allen totaling $3,090 and that out of that he won approximately $850 (R. 329). Moore also testified that he had heard Stroup speak in the courtroom the day before his testimony and, upon listening to tape number 16, he testified that a voice on that tape sounded like Stroup (R. 311-331).

David Looney was called as a witness and testified that he had been convicted of professional gambling on February 28, 1975 (R. 302). He testified that beginning in April, 1974 he had accepted bets on basketball games from Harold Halliburton (R. 302, 303). The witness and Robert Singer worked at Firestone Tire & Rubber Company together and had worked together accepting bets and collecting money (R. 302-304). David Looney is the brother-in-law of defendant John D. Stroup and had been for some 30 years (R. 304). The witness called Stroup "Allen" (R. 304, 305). The witness testified that in April or May of 1974 Stroup lived on Northaven (R. 305). The witness also testified that in April or May of 1974 Stroup's phone number was 358-7958 (R. 305). And, the witness testified that he gave Halliburton the telephone number of 358-7958 because Halliburton wanted to bet some baseball and the witness did not handle baseball in his gambling operation (R. 305). The witness identified the State's exhibits which were photographs of a house and identified the house as the defendant's and the

automobile as one looking like defendant's. The witness testified, after listening to Exhibit 4, that one of the voices sounded like Stroup's but he would not swear to it (R. 307).

The first witness for the defense was Robert Singer who, after listening to Exhibit 16 which was played for him by the defense counsel and being asked if he could swear under oath that the exhibit contained the voice of John Stroup, testified as follows:

> I don't know; I ain't going to swear to it; I mean, it does sound like his voice . . . (R. 346).

The next defense witness, James C. "Gene" Weaver testified that he operated an ambulance service which picks up patients not able to walk and carries them to and from their medical appointments (R. 365-367). He testified that his company had taken the defendant from his home at 815 Northaven Drive to and from his doctor's office on April 21, 1974 (R. 369). He testified that he had known the defendant for many years and that his service had taken defendant to medical appointments on other days up to and including May 7, 1974, which was the last date his records reflected (R. 369-371).

The next witness was Harold Demarrero who testified that he was an employer of defendants on several occasions to include June of 1973 when the defendant hurt his back (R. 380-390).

BRIEF

Respondent submits that the decision of the Court of Criminal Appeals of the State of Tennessee in this case is correct and should not be reviewed for the following reasons:

I. Response to Question Presented No. 1.

A. State statutes are presumed not to violate the United States Constitution until proven otherwise.

A decision in favor of petitioner in this case would require that this Court hold Tenn. Code Ann. § 40-2707 to be unconstitutional under the Constitution of the United States. It is an axiom of constitutional law that state statutes are presumed constitutional until proven otherwise. Accordingly, this Court has consistently declined to invalidate statutes because they were merely ill-advised or unwise. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 1262 (1966); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 1030-1031 (1963). Respondent contends that Tenn. Code Ann. § 40-2707 is entitled to this presumption regardless of its status under the Tennessee Constitution.

B. Jury instructions on the law of parole and related matters do not constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

Respondent disagrees with petitioner's contention that the complained of jury instructions constituted a denial of due process of law. It is submitted that a defendant's right to fair sentencing is not prejudiced by such instructions. Several state courts have held similar instructions to be permissible. *See,*

e.g. People v. Riser, 47 Cal. 2d 566, 305 P.2d 1, *cert. denied*, 353 U.S. 930, 77 S.Ct. 721 (1956); *Phillips v. State*, 92 So. 2d 627 (Fla. 1957); *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959).

Instructing the jury as to the law of parole can be supported by sound reasoning. In states that vest sentencing power in the jury, it is necessary for the jury to have access to as much information as is constitutionally possible in order to arrive at a fair sentence. It is submitted that, to that end, a state has authority to legislate that the jury be given instructions on parole law and related matters. *Farris v. State*, 535 S.W.2d 608, 617-19 (Tenn. 1976) (two justices dissenting).

Petitioner has set forth two assertions in support of the contention that jury instructions regarding parole, good time, and honor time constitute a denial of due process under the Federal Constitution. Those assertions are the possibility that a jury may impose a greater sentence because the jury knows it could be reduced and that a jury may reach a compromise verdict as to guilt and pass their duty on to a body such as a board of pardons and parole to make a decision about a defendant's worthiness to live in society.

With respect to the second assertion, respondent submits that the question of a compromise verdict as to guilt is not within the question presented to this Court for consideration. The question presented relates only to sentencing. Furthermore, there is no reason to suppose that if a jury believed a defendant to be innocent that they would then convict and sentence the defendant on the basis that a board of pardons and paroles could later determine whether he was worthy to return to society. And, if a compromise verdict had occurred in the instant case, respondent submits that the sentence imposed would have been a minimum sentence, one year in this case, and not double the minimum as imposed by the jury.

With respect to the assertion that juries instructed as in this case may impose a greater sentence because of knowledge that the actual time to be served could be reduced, respondent submits that there is no proof to support this and that it is based on speculation. Additionally, it is submitted that the State has authority to legislate on procedures for sentencing in criminal cases and that no federally protected constitutional right is involved.

Petitioner has also submitted to this Honorable Court that the Supreme Court of Tennessee, in *Farris v. State, supra,* indicated that the complained of instructions constituted a violation of due process. Respondent disagrees and would point out that in the dissenting opinion two justices held the statutory provisions concerned to be constitutional. *Farris v. State,* 535 S.W.2d at 615. A concurring justice agreed that the statutory provision in question was unconstitutional under the Constitution of Tennessee in that the body of the enactment was broader than the caption. *Farris v. State,* 535 S.W.2d at 615. That same concurring justice noted that the statute could also be unconstitutional under the Tennessee Constitution because the legislature had exercised a judicial power. 535 S.W.2d at 615.

The principal opinion in *Farris,* concurred in by one justice, did indicate the complained of instructions constituted a violation of due process. 535 S.W.2d at 614. However, this holding came only after that same opinion held the statutory provision unconstitutional under the Tennessee Constitution because the body of the enactment was broader than the caption. 535 S.W.2d at 610.

C. The controlling statute, Tenn. Code Ann. § 40-2707, has been held unconstitutional under the Constitution of the State of Tennessee by the Tennessee Supreme Court and therefore the issue has been substantially mooted.

The complained of jury instructions were given by the Tennessee trial court in response to the explicit direction of the Tennessee Legislature in Tenn. Code Ann. § 40-2707. This statute required trial courts to instruct juries as to the state law of parole and related matters.

It is submitted that because this statute has been held unconstitutional under the Constitution of the State of Tennessee by the Tennessee Supreme Court in *Farris v. State,* 535 S.W. 2d 608 (Tenn.), *opinion on rehearing, id.* (1976), the issue has been substantially mooted. Although the Tennessee court decided *Farris* on a different issue from that presented to this Court, the effect was to invalidate the statute. The Tennessee court further held that the giving of the complained of instructions in the future would automatically constitute reversible error. *Id.* at 622.

However, the *Farris* holding was not made retroactive. It did not apply to convictions that had become final before the filing of the *Farris* opinion. *Id.* at 614-15. A few cases that had been tried but had not become final, *i.e.,* were still being appealed at the time of *Farris,* were left in limbo. The *Farris* court held that cases falling in this hiatus period were to be dealt with on an ad hoc basis requiring a consideration of the facts of each. *Id.* at 622.

Petitioner's case falls in this hiatus category. Such cases are the only ones that could be affected by this Court's acceptance of the instant petition. Furthermore, most of them have without doubt already been processed in the state courts under the

Farris guidelines, given the fact that *Farris* had decided twenty (20) months ago. *E.g. Adams v. State*, 547 S.W.2d 553 (Tenn. 1977); *Loveday v. State*, 546 S.W.2d 822 (Tenn. Crim. App. 1976). The instant case may well be the only one that would be affected by a decision by this Court in this case.

II. Response to Question Presented No. 2.

A. Even if the complained of jury instruction constituted error, application of a harmless error standard was appropriate.

The question presented by petitioner is whether there can ever be harmless error where a jury is instructed regarding parole, good time, and honor time. Respondent submits that the question must be answered in the affirmative. This Court has at least three times stated a rule for determination of harmless error when confronted with an error of constitutional magnitude. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

In *Harrington*, the majority stated as follows:

> The case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* . . . that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence. 395 U.S. at 254, 89 S.Ct. at 1728.

A dissent in *Harrington* by Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Marshall, expressed the belief that the majority had overruled *Chapman* by considering the

issue of the substantiality of the evidence and not the effect on the jury's decision caused by the tainted evidence. 395 U.S. at 256, 89 S.Ct. at 1729.

Based upon these authorities, respondent submits that application of a harmless error standard in the instant case is appropriate. This is particularly so because the question presented relates only to sentencing.

B. The Court of Criminal Appeals of Tennessee correctly held the alleged error in the instant case to be harmless.

In this case the Tennessee Court of Criminal Appeals, following the Tennessee Supreme Court's holding in *Farris*, presumed that the complained of jury instructions constituted error. Taking the ad hoc approach mandated by *Farris*, the court nevertheless affirmed petitioner's conviction, finding that the error was harmless. *Stroup v. State* (A. 6).

The facts, as set forth in the Statement of the Case hereinbefore, support the lower court's finding of harmlessness. The evidence against petitioner was great and was contradicted only by the testimony of an accomplice. The petitioner did not testify. The jury, having found petitioner guilty, could have sentenced him to a maximum of five (5) years in prison and a one thousand dollar ($1,000) fine. Instead it sentenced him to only two (2) years imprisonment. Therefore, petitioner's claim that the jury instructions influenced the jury to impose a heavy sentence is contradicted by the facts.

The Tennessee Supreme Court, which was surely sensitive to this issue after its holding in *Farris*, approved the holding of the Court of Criminal Appeals that such error was harmless in the instant case by "(f)inding no error" and denying certiorari (A. 1).

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that the petition for a writ of certiorari should be denied.*

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari has been forwarded to Mr. William R. Willis, Attorney at Law, 700 Union, Nashville, Tennessee 37219, this 25th day of October, 1977.

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* Acknowledgment is made to Mr. William P. Sizer, an August graduate of the University of Tennessee College of Law employed in the Office of the Attorney General of Tennessee as a law clerk, for research and assistance in preparation of this Brief.